IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 214

MRS. ABA BADGER SUTTLE, Widow of
JOHN G. SUTTLE, ETC.,

Petitioner,

versus

REICH BROS. CONSTRUCTION COMPANY, ET AL,

Respondent.

BRIEF ON BEHALF OF MRS. ABA BADGER SUTTLE, WIDOW OF JOHN G. SUTTLE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN G. SUTTLE, DECEASED, ETC., PETITIONER.

ENGIE, LAUB,
ADAMS and FORMAN,
MILLER & BLOCH,
CHAS. F. ENGLE,
JOHN D. MILLER,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC.

SYLLABUS

Where suit was brought in the Eastern District of Louisiana by a citizen and resident of Mississippi against citizens and residents of the Western District of Louisiana and a Texas corporation whose agent for service of process resided in the Eastern District of Louisiana, and such corporation, by state law, was a resident of the Eastern District, the VENUE was probably laid in either district.

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STATEMENT OF THE CASE

Mrs. Aba Badger Suttle, widow of John G. Suttle, individually and as Administratrix of the Estate of John G. Suttle, deceased, etc., a citizen and resident of the State of Mississippi, brought this suit in the Federal District Court of the Eastern District of Louisiana, against Reich Bros. Construction Company and the individual members thereof, citizens of Louisiana and residents of the Western District of Louisiana, and the insurer of Reich Bros., Construction Company, the Highway Insurance Underwriters, a Texas corporation,

authorized and qualified to do business in Louisiana, whose agent for service of process resides in the Eastern District of Louisiana, seeking judgment for death, personal injury and property damage resulting from an automobile accident, which occurred on December 10, 1945, in the Eastern District of Louisiana. The Reich Bros. Construction Company and the individual members thereof and also the Highway Insurance Underwriters filed Motions to Dismiss the Plaintiff's complaint on the grounds of improper venue. Upon the hearing of said actions, the U. S. District Court dismissed the motion of the Highway Insurance Underwriters, holding that, under the Consent Doctrine established in the case of *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165; 60 Supreme Court 153; 84 Lawyers' Edition 167, the Highway Insurance Underwriters was properly brought into Court in the Eastern District of Louisiana and might equally as well have been brought into Court in the Western District of Louisiana. But the District Court upheld the Motion of the Reich Bros. Construction Company and the individual partners thereof, and dismissed the Plaintiff's suit as to them, holding that these Defendants had a right to insist on being sued in the District of their residence unless their co-defendant was a resident of the other district of the State and that the co-defendant, the Highway Insurance Underwriters, was not a resident of the other district of the State; therefore, that the Reich Bros. Construction Company and the individual members thereof could be sued only in the district of their residence. An appeal was taken from this judgment to the U. S. Circuit Court of Appeals for the Fifth Circuit and the said Circuit Court of Appeals affirmed said judgment, in an opinion reported in 161 F. 2d. 289, holding that the Highway Insurance Underwriters was

not a resident of the Eastern District of Louisiana and, therefore, that the Reich Bros. Construction Company and the individual partners thereof had a right to object to being sued outside of the district of their residence.

Petitioners then presented a Petition for Rehearing to the Circuit Court of Appeals. Same was denied without written opinion.

ASSIGNED ERRORS TO BE ARGUED

The errors in the opinion below and the decree based thereon are:

(a). The question which is determinative of this case is: was the co-defendant, Highway Insurance Underwriters, a resident of the Eastern District of Louisiana for Federal venue purposes. The Circuit Court of Appeals said, 161 F. 2d. at page 290: "The question must be decided under Federal law for it is apparent that if a foreign corporation which had qualified under the state statutes to do business in Louisiana were held to be an inhabitant, resident, or citizen of Louisiana to the same extent as a domestic corporation, then no citizen of Louisiana could sue such a foreign corporation in the Federal Courts of that state, nor could such a case be removed to the Federal Court. The impact of such a holding on the jurisdiction of the Federal Courts would be so devastating that if such a result is to be achieved it must come through Congressional legislation rather than through state statutes and decisions thereon." And, on page 291: "The corporate defendant was neither a resident nor an inhabitant of the Eastern District of Louisiana," Both of the quoted statements are erroneous, the second wholly and the first in all material respects.

(b). The Circuit Court of Appeals erred in holding that the Eastern District of Louisiana was without jurisdiction of the defendants in the Western District.

(c). That Court erred in refusing to recognize that state law alone determines the status of parties within a state, as residents, as distinguished from their citizenship or domicile.

(d). The Court erred in overlooking or not considering the fact that by doing business with the Corporation the Partnership respondents consented to be sued in any district in which jurisdiction was proper as to the Corporation.

(e). The Court erred in holding in effect that the Federal venue statutes are subject to as strict an interpretation as the Federal jurisdiction statutes, and further erred in disregarding the present tendency of the United States Supreme Court toward a more liberal interpretation of the Federal venue statutes.

ARGUMENT

The primary error in the Circuit Court of Appeals was in confusing citizenship with residence. If the terms as used in the venue statute are synonymous that Court was correct; otherwise, it was manifestly wrong. Since the law does not define "residence" and no definition of residence can be found in any other Act of Congress, it is necessary to look to the law of the State to ascertain whether or not a person or corporation is a resident of such state. The authorities support this claim.

Jud. Code, Section 52, 28 U.S.C.A. 113, provides: "When a state contains more than one District, every suit of a local nature, in the District Court thereof, against a single defendant, inhabitant of such state,

must be brought in the District where he resides; but if there are two or more defendants, residing in different Districts of the state, it may be brought in either District, and a duplicate writ may be issued against the defendants, directed to the Marshal of any other District in which any defendant resides." Substantially, the same language will be found in Judicial Code, Sec. 53. U.S.C.A., Sec. 112, reads in part: "When the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the District of the residence of either the plaintiff or the defendant." This Section contains an exception as to the situations contemplated in Sections 113 to 117.

This venue statute refers both to citizenship (the Constitutional basis of jurisdiction) and residence or inhabitancy (regulating venue alone) and the context and plain meaning of the law shows that the terms are used as referring to different matters and that they are not identical as held below.

If Highway Insurance Underwriters, a Texas corporation, doing business in Louisiana and which had appointed the Secretary of State of Louisiana, residing in the Eastern District of the State, as its Agent for service of process, was a resident of the Eastern District, venue was properly laid in that District as to the defendants residing in the Western District.

The Circuit Court of Appeals announced, *ex cathedra*, that a corporation could not be a resident of any District other than that in which it was created, but pointed to no constitutional or statutory authority in support of what, lacking such authority, seems to be bare judicial legislation.

All of the powers of the people and of the states which were not delegated to the national government were reserved to the states or to the people. Petitioners believe that among those reserved powers is that of determining who are and who are not citizens of the State, (except as modified by later amendment), and who are and who are not residents of the State.

The State of Louisiana has clearly and unequivocally provided in its laws, as interpreted and applied by the highest Court of the State, that foreign corporations qualified to transact business there, such as the corporate defendant in this case, are residents of the State, and of the Parish where localized, as fully and to the same effect as if such corporations had been organized in and domiciled in the State. The Circuit Court of Appeals erroneously refused to give any effect to this law and jurisprudence. The Court ignored the fact that only by reference to the laws of Louisiana can it be determined who are residents of that State to whom the Federal venue statute may be applied. It is doubtful if the Congress has the Constitutional power to declare who are residents of a State, and it is certain that the Congress has never attempted to exercise such power.

Under Louisiana Act 267 of 1914, as amended by Act 120 of 1920, a foreign corporation, on complying with its requirements, has "the same powers, rights and privileges" as domestic corporations. Dart's Stat. 1246. Such corporations are on a parity for all practical purposes, with those created under Louisiana laws. *Simms Oil Co. vs. Wolfe.* 3 Fed. (2d) 36.

The jurisprudence of Louisiana is uniform to the effect that a domesticated foreign corporation is a "resident" of Louisiana.

In *White Oil Corp. v. Flanagan*, 153 La. 837, 96 So. 675, the designated place of business of a Delaware Corporation in Louisiana was termed its "designated domicile."

In *Gulf Refining Co. v. Tillinghart*, 152 La. 847, 94 So. 418, the Supreme Court of the State held that where a corporation from another state had not made a declaration of its LOUISIANA DOMICILE the Legislature had the power to fix the situs of its property for local taxation. See also, to the same effect, the concurring opinion of Justice Land, in *Union Tank Line v. Day*, 143 La. 771, 79 So. 334.

Art. 240 of the Louisiana Code of Practice, which sets out the grounds for attaching the property of debtors, includes as one such ground, in Sec. "(2)", the following: "When such debtor resides out of the State." *Burgin Bros. v. Barker Baking Co.*, 152 La. 1075, 95 So. 227; and *Fullilove v. Central State Bank*, 160 La. 831, 107 So. 590, held squarely that a corporation, though organized under the laws of another state, when it complied with the State law and registered an agent for the service of process, was not subject to attachment as a non-resident. On the other hand, a foreign corporation which does business there without appointing such an agent, is subject to attachment as a non-resident. *Palmer v. Avalon Oil Co.*, 10 La. App. 512, 120 So. 781.

The Louisiana courts in the cases cited hold this to be purely a question of local law, and refuse to consider contrary rulings in other jurisdictions.

In the *Fullilove* case (160 La. 831, 107 So.—590) the Court stated that such a corporate defendant could not be proceeded against as a non-resident, and the clear and unavoidable effect of the *Burgin* (152 La. 1075)

case is that foreign corporations complying with the State laws must be treated for jurisdictional and other purposes as residents. They have the same powers, rights and privileges as are accorded domestic corporations.

In the *Burgin* case, 152 La. at page 1078, we find the following reasoning, which is determinative of the issue before this Honorable Court: "As defendant company, though formed under the laws of Tennessee, is domiciled in this State, it is a 'domestic' corporation within the definition of Sec. 23 of Act 267 of 1914, and is not subject to attachment as a 'foreign' corporation, on the ground of non-residence. * * *

* * * "A natural person can have but one domicile. On the other hand, an artificial person or corporation, may be created by the laws of several states, and become a distinct corporation in each, and domiciled therein, and may be sued as such distinct corporation, in the state in which it has been incorporated and in which it had a domicile." (Citing authorities.

On rehearing (p. 1081) the Court said: "Attachments of the second class (against non-residents) are clearly applicable only in the cases of absentees or of non-residents." The attachment was set aside because this Tennessee corporation was not a non-resident. And at P. 1082: "The reason and the policy of the enactment is to be found in the desire of the Legislature to substitute for the inadequate remedy of the Code of Practice, at least so far as foreign corporations are concerned, a method whereby such corporations may become subject to the full and complete jurisdiction of the courts of the state. * * * "

"It would seem, therefore, to be almost too plain to admit of argument to the contrary, that a foreign

corporation doing business within the State and with an Agent residing therein for the purpose of service of legal process is subject personally to the jurisdiction of the courts, **and is to be regarded as a resident for all purposes connected with legal process.**" (Emphasis supplied.)

The Court cited with approval Thompson's Commentaries on Corporations, Vol. 6, p. 6420: "We have already had occasion to note the principle that foreign corporations may become domesticated so as to be, for all purposes of jurisdiction and procedure, domestic corporations within the State in which they acquire a qualified settlement and residence for the purpose of their business."

In *Noyola v. Norske Lloyd Insurance Co. Ltd.*, 163 La. 82, 111 So. 607, we find: "All foreign insurance companies doing business in the State are required to appoint the Secretary of State as their agent for service of process. Act 105 of 1898, Art. 2, Sec. 1, p. 142. The Norske Lloyd Insurance Co. Ltd. complied with the provisions of the statute. Therefore, said corporation acquired a qualified residence within the State for the purpose of its business, and became domesticated, at least, **for all purposes of jurisdiction and legal procedure.** The place of its residence, insofar as the service of legal process is concerned, is necessarily the office of the Secretary of State at Baton Rouge." (Emphasis supplied.)

In citing this case, with approval, in *Pittman Bros. Construction Co. v. American Indemnity Co.*, 194 La. 437, 193 So. 699, the State Supreme Court said: "The compliance with the provisions of Act No. 9 of 1934, by defendant, The American Indemnity Company, a foreign corporation, has likewise domesticated that corporation

for the purpose of jurisdiction and legal process in this state, and the place of its residence, insofar as the service of legal process is concerned, is necessarily the office of the Secretary of State at Baton Rouge, Louisiana."

The domicile of a domesticated corporation is in the Parish where its agent for service of process is located. *Nelvon v. Continental Co.*, 11 La. App. 450, 123 So. 474.

One of the clearest statements of the powers of the States will be found in the recent case of *Stewart v. Ferer*, 163 F. 2d. 183, 185, C.C.A. 10: "A sovereign state has jurisdiction to determine the civil status and capacities of its inhabitants and to prescribe the conditions on which judicial proceedings affecting them may be commenced and carried on within its territory." This is directly contrary to what the Fifth Circuit held here.

The residence of a corporation is any county in which it does business. Black's Law Dict. 3rd Ed. p. 1543, citing numerous cases.

In this case the Highway Insurance Underwriters was just as much an inhabitant ("resident") of the Eastern District of Louisiana as any corporation, domestic or foreign, could be.

It was held below in effect that Highway Insurance Underwriters was enough of a resident to be sued there, but not enough of a resident to justify joining with them the defendants from the Western District.

Until the decision below the Federal Courts have always recognized the difference between "citizenship" and "residence." This Court in the case of *Steigleder v. McQuesten*, 198 U.S. 151, 49 Lawyers Edition page 986, states "It is to be observed that the grounds assigned for the motion to dismiss the cause, taken alone, did not distinctly raise any question concerning the absence of diverse citizenship; for the motion only stated that

the plaintiff and the defendants were, respectively, residents of the State of Washington. But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution, and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States, and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purpose of jurisdiction."

In the case of *LaTourette v. McMaster*, 248 U.S. 465, 63 Lawyers Edition 362, this Court discusses the distinction between citizenship and residence, and Justice McKenna, speaking for the Court about the South Carolina statute in question in the case, states "The word 'resident' and 'citizen' are both used, each apparently in its ordinary legal sense which is well defined and understood making a distinction which is substantial in its purpose and one that is sanctioned by the highest judicial authority."

We respectfully call the Court's attention to the line of decisions of the United States Supreme Court, distinguishing between the terms "citizenship" and "residence":

Parker v. Overman, 59 U.S. 318-18 How. 137;
Robertson v. Cease, 97 U.S. 646, 24 L. Ed. 1057;
Realty Holding Co. v. Donaldson, 268 U.S. 396, 60 L. Ed. 1014;
Oxley Stone Co. v. Butler, 166 U.S. 684, 41 L. Ed. 1149;

and this recognized distinction between residence and citizenship is still followed by the Federal Courts, as shown by the following recent decisions:

Fort Knox Transit v. Humphrey, 151 F. 2nd 602;

Townsend v. Bucyrus-Erie Co., 144 F. 2nd 106;
Jeffcott et al v. Donovan, 135 F. 2nd 213;
Fowler v. Baker, 32 F. Supp. 783;
Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305;
Shreveport Longleaf Lumber Co. v. Wilson, 38 F. Supp. 629;
Baker v. Keck, 13 F. Supp. 486.

We particularly call the Court's attention to the case of *Townsend v. Bucyrus-Erie Company*, 144 F. 2d 106, in which Judge Murrah, speaking for the Circuit Court of Appeals for the Tenth Circuit, states: "State citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases under Section 24 of the Judicial Code 28 U.S.C.A. Section 41 (1), and residence in a judicial district for venue purposes under Section 51 of the Judicial Code 28 U.S.C.A. Section 112, are not necessarily one and the same thing—they are not synonymous, coexistent or convertible terms. One may have a residence in a state while his citizenship continues in another." In the case of *Jeffcott v. Donovan*, 135 F. 2d 215, Judge Stephens, speaking for the Circuit Court of Appeals for the Ninth Circuit, states "Diversity of citizenship as a basis for the jurisdiction of a case in the District Court of the United States is not dependent upon the residence of any of the parties, but upon their citizenship. Bouvier (Baldwin's Student Edition 1934) says: 'Citizen and resident (q.v.) are not synonymous and in some cases distinction is important'. It might well be that a resident of any one state in point of fact may be a citizen of that or any other state." And this is particularly true of a corporation. * * * In *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511, 78 L. Ed. 1936, Justice Cardozo, in referring to the *Taylor* case (266 U.S. 200, 69 L. Ed. 247, 42 A.L.R. 1232) pointed

out that in the case cited it had been held that the Plaintiff Delaware corporation, with a usual place of business in Missouri "is a resident of Missouri—that is, has a usual place of business within the State." As to the Delaware corporation he said: "For many purposes, its domicile in law is in the state of its creation (citing cases), but it is living its life elsewhere. In a very real and practical sense, it is a resident of the forum, like the plaintiff in the *Taylor* case, who was domiciled in one State, and resided in another. * * * Residence, however, even though not controlling, is a fact of high significance."

We therefore submit that the Circuit Court of Appeals for the Fifth Circuit was in error in holding that if the corporation were declared a resident of a particular Federal District in a state for venue purposes, it would thereby become a citizen of that state for jurisdictional purposes. At variance with the other Circuits and with this Court, the Court below held citizen and resident to be synonymous terms, and thereby denied to plaintiff a substantial right, that is to sue all defendants in one suit where the cause of action arose.

Prior to the decision of the United States Supreme Court in *Neirbo v. Bethelem Ship Building Company*, 308 U.S. 165, 84 L. Ed. 167, a corporation could not be sued outside of the state in which is was incorporated, unless plaintiff resided in the state where the suit was brought.

The decision in the *Neirbo* case which subjected a corporation to suit in any state in which it had appointed an agent for service of process, was based on the theory of consent by the corporation to be sued where it had appointed such an agent. It was recognized at the time of this decision, and it has never been

disputed that this consent on the part of the corporation was a fictional consent.

Since the Neirbo decision this doctrine of fictional consent has been broadened to include situations where a corporation does not actually appoint an agent, but where an agent is designated by state statutes; and the doctrine of consent has even been extended to situations where individual defendants who are using the highways of a state have been considered as consenting to be sued in the Federal Courts in that state where a state statute designates an agent for service of process, with respect to non-resident motorists, *Krueger vs. Hider*, 48 F. Supp. 708.

No one could seriously contend that there is actual consent on the part of the defendants in these cases. Consent is implied to the defendants by the Federal Courts, and is entirely fictional, and it is implied for the purpose of broadening the venue statutes so that a defendant can be sued in the Federal Courts of the state where the cause of action arose, and the consent of the defendants has been extended to cover the Federal Courts in any district in such states.

We can see no reason for not applying the doctrine of consent to the respondent partnership, and the members thereof, in the present case. The respondent partnership and its members are presumed to know the law; they therefore, knew that the corporation was suable in the Eastern District of Louisiana; they knew that they could be made joint defendants with the corporation; they sent their trucks and equipment into the Eastern District of Louisiana in the operation of their business.

We respectfully submit that by their knowledge and their acts they consented to be sued in the Eastern

District of Louisiana, and that their consent in this case is in effect a more actual consent than the fictional consent in the situations which we have above mentioned.

The decision of the Circuit Court of Appeals in this matter, if carried to its logical conclusion, would be discriminatory in nature. It would mean that the defendant, Reich Bros. Construction Co., and the individual members thereof, would be in a better position, having taken out insurance with a foreign corporation than they would be if they had taken out insurance with a corporation which had been incorporated in the Eastern District of Louisiana.

As we have above pointed out, prior to the decision in the *Neirbo* case, a corporation could not be sued outside of the state of its incorporation. The Neirbo decision broadened the effect of the venue statutes so that a corporation could be sued in the Federal Courts of a state in which it appointed an agent for service of process. The question then arose as to whether the venue statutes in such cases should be restricted to the district where the agent for service of process resided, and in meeting this situation, the Federal Courts again broadened the effect of the venue statutes so that a corporation doing business in a state could be sued in any district in that state regardless of the place of residence of its agent for service of process. *Keen vs. Mid-Continent Petroleum Company*, 58 F. Supp. 915. *Dehne vs. Hillman Investment Company*, 110 F. 2nd. 456. *Oklahoma Packing Company vs. Oklahoma Gas & Electric Company*, 309 U.S. 4, 60 S. Ct. 215.

The venue statutes have now been further broadened to extend to individuals who are motorists through a state, and under present decisions of the Federal Courts, such defendants may be sued in any district of the state

through which they are motoring. *Krueger vs. Hider*, 48 Fed. Supp. 708; *Steele vs. Dennis*, 62 F. Supp. 73.

We ask the Court in this case to hold that the respondent partnership and its members are suable in the Federal District in which their co-defendant is suable, where the requisite diversity of citizenship exists between the parties.

We respectfully submit to the Court and strongly urge that the term residence, as used in the venue statutes in question, means nothing more than amenability to suit, and that since the corporate defendant is amenable to suit in the Eastern District of Louisiana, then the entire requisite of residence under the venue statutes in question has been fulfilled so that the respondent partnership and the members thereof can be brought into the Eastern District of Louisiana for purposes of this suit. To hold otherwise would be to place such a technical and over-refined construction on the term residence as to unnecessarily restrict the venue statutes in question and as to run completely counter to the present tendency of the Federal Courts to broaden and liberalize the venue statutes of the United States, in contrast to the strict construction of all jurisdictional requirements.

The respondent partnership and the members thereof in this case were doing business in the Eastern District of Louisiana and were insured by a corporation which was suable in that District. While engaged in the operation of their business there they were involved in the accident upon which this suit is based.

The whole tendency of the Federal Courts, as we have above pointed out, is to allow defendants to be sued in more places, particularly in collision cases, with

a view toward allowing such cases to be tried in the Federal Courts of the State and district where such accidents occurred.

We most strongly urge this Honorable Court not to bring to a halt this beneficial trend to a simpler, fairer and more just and more convenient trial of cases in the Federal Courts insofar as venue is concerned, and we most strongly urge that the respondent partnership and the members thereof in this case not be allowed to escape suit in the Eastern District of Louisiana by strict and technical and, as we most sincerely believe, erroneous judicial construction of the term **residence** in the venue statutes in question.

We therefore submit that for all of the reasons above cited, the judgment of the Circuit Court of Appeals Fifth Circuit in this case should be reversed.

Respectfully submitted,

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